Nos. 97-1943 and 97-1992

IN THE

Supreme Court of the United States

October Term, 1998

Karen Sutton and Kimberly Hinton,

Petitioners,

v.

United Air Lines, Inc.,

Respondent.

and

Vaughn L. Murphy,

Petitioner,

v.

United Parcel Service, Inc.

Respondent.

On Writs of Certiorari to the United States Court of Appeals For the Tenth Circuit

BRIEF OF *AMICUS CURIAE* SOCIETY FOR HUMAN RESOURCE MANAGEMENT IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE

The Society for Human Resource Management ("SHRM"), the voice of human resource professionals for over 50 years, submits this brief in support of Respondents United Air Lines and United Parcel Service.[1] SHRM represents over 113,000 human resource professionals in the United States and in 80 other countries. SHRM leads, educates, and provides a forum for human resource professionals regarding matters of critical daily importance to managing employees in the workplace. Human resource professionals develop and administer structures to recruit, train, and manage employees in all types of work environments. SHRM and its members are deeply concerned with understanding and implementing all non-discrimination and equal opportunity laws and principles in the workplace.

In this particular case, SHRM's members are typically the persons involved in implementing, administering and training on non-discrimination policies covering employees with disabilities, guarding employees' medical information, and developing reasonable accommodations under the Americans With Disabilities Act of 1990, 42 U.S.C. § 12101, *et seq.* ("ADA"). Grasping the ADA's fluid requirements, especially in light of inconsistent EEOC interpretations and conflicting court rulings, poses a unique challenge to SHRM members and anyone managing disabilities in the workplace.

The cases before this Court on the value of mitigating measures and treatments highlight this challenge. Though trained in evaluating job performance and functional limitations of individuals (with or without disabilities), human resource departments and staffs lack the medical training

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[1] *Amicus* files this brief, pursuant to Supreme Court Rule 37.3, with the written consent of the parties. Evidence of said consent is filed concurrently with this brief. No person or entity other than *amicus curiae*, its members, or its counsel authored any portion of this brief or made any monetary contribution to the preparation or submission of this brief.

necessary to speculate on how physical or mental conditions *would theoretically* affect an individual in the absence of effective treatments that render a person perfectly functional in and out of the workplace. Yet, the rule urged by Petitioners and some *amici* -- that mitigating measures such as medical regimens, auxiliary aids, or common treatments should never be considered in determining whether an individual with a physical or mental impairment is substantially limited in a major life activity so as to have a "disability" under the ADA -- places human resource professionals precisely in this untenable position. The practical experience of SHRM members teaches that such a rule is simply unworkable. Moreover, Petitioners' proposed rule defies the language and intent of the ADA.

SHRM urges the Court to seize this opportunity to formulate a clear and consistent rule, one that protects the interests of the intended beneficiaries of the ADA, that comports with the statutory language and with the EEOC's approach to other aspects of the ADA, and that allows for ease of application in the real world of the workplace, benefitting employers and employees alike. Employees should be assessed solely on the basis of how they actually function, with whatever medical aids they normally use.

SUMMARY OF ARGUMENT

In enacting the ADA, Congress intended to protect the minority of Americans with true physical or mental disabilities who, despite their condition, can function in the world of work. The ADA seeks to bring formerly marginalized persons into the mainstream of society, not *vice versa*. The vast majority of people who wear eyeglasses, or who take medications that fully or substantially relieve the effects of a wide variety of common conditions, are not generally seen as having "disabilities," have not been marginalized, and should not fall within the ADA's special definition of its protected class. In determining who has a "disability" under the ADA, employers and courts should

evaluate persons individually as they actually function, and not speculate on how they might function in some hypothetical state.

The entire language and structure of the ADA bespeak Congress' intent to look to individuals' actual abilities, and to discourage employers from conjuring up imaginary scenarios that only feed stereotypical views of persons with physical or mental impairments as persons who cannot function. Thus the rule urged by Petitioners and the EEOC not only trivializes the ADA's purposes, it works against those purposes. It also places an impossible burden on employers, who lack the resources and medical expertise to predict the potential dysfunctions of a now-functional individual if medications or devices were removed.

The EEOC's interpretations of other aspects of the ADA affirm the guiding principle that any inquiry should focus on actual function and actual "substantial limitations" to the individual's major life activities. Its argument that mitigating measures should not be considered in defining an individual's disability is therefore inconsistent with its overall approach to the ADA. Along with an ambiguous legislative history, this inconsistent approach has in turn led to conflicting court rulings, and to hopeless confusion among employers and employees alike. Again, the Court needs to articulate a clear, simple rule, one that comports with the actual language of the statute, that protects those intended to be protected, and that can be readily applied in the real world of work. This real-world, total-picture approach, one that regards each person as a functioning individual, is far superior to the inflexible, artificial, and confusing definitional scheme that Petitioners seek to advance. It is also truer to the ADA's language and purposes.

The rule SHRM urges will not leave ADA's intended beneficiaries unprotected. Some ameliorative measures, such as medication with severe side effects, may impair an employee's function, or leave the individual still "substantially limited" in his or her major life activities. In

such cases, those effects, too, should be taken into account in a functional-ability test.

ARGUMENT

I. PETITIONERS' PROPOSED RULE, TO DISREGARD THE ACTUAL, SALUTARY EFFECTS OF AMELIORATING TREATMENTS IN DETERMINING "DISABILITY" STATUS AND "SUBSTANTIAL LIMITATIONS," IS UNWORKABLE AND IGNORES CONGRESSIONAL INTENT AND THE ADA'S EXPRESS LANGUAGE.

In several respects, the rule which Petitioners and the EEOC propose runs directly counter to the ADA's purposes as expressed in the statutory language.

A. By Petitioners' Approach, Most Americans Have "Disabilities" Under the ADA.

In its Findings and Purposes accompanying the ADA, Congress hailed the protection of 43 million Americans with disabilities, and declared the laudable goals of eliminating disability discrimination and bringing persons with disabilities into the mainstream of American society. 42 U.S.C. § 12101 (a). Far from bringing persons with disabilities in the mainstream, however, Petitioner's proposed rule would by definition force persons from the mainstream -- indeed, the vast majority of Americans -- into the ranks of persons with "disabilities."

The numbers alone reveal the fallacy of Petitioners' rule. For example, 147 million Americans, or 55% of the population, wear eyeglasses or other corrective lenses.[2] This

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[2] *Caring for the Eyes of America*, the annual report of the American Optometric Association, St. Louis, Missouri (1998). In its amicus brief, the EEOC cites a government study which found that an even higher number of adults -- 63% -- wear eyeglasses or contact lenses. Brief for the United States and the Equal Employment Opportunity Commission as Amicus Curiae Supporting Petitioners, p. 10, n.1. Other statistics which appear below were derived from the official websites of the organizations cited: The American Heart Association (www.amhrt.org); the National Center for Health Statistics (www.cdc.nchswww/default.htm); the American Psychiatric Association (www.psych.org).

does not even include the persons who no longer wear corrective lenses due to successful corrective laser surgery. In most cases, these persons function normally in virtually all occupations. They fly airplanes, drive trucks, and even excel in professional sports. Yet, Petitioners and the EEOC declare that ameliorating measures should not be taken into account in determining whether an individual has a "disability" under the ADA.[3] By this interpretation, conceivably 55% of the U.S. population -- individuals *without* their corrective lenses, a great many of whom could not function normally in their present jobs without eyesight correction -- falls within ADA coverage. Congress could not have intended to afford the ADA such a wide sweep.[4]

Indeed, the example of corrective lenses represents only the tip of the iceberg.

- The American Heart Association estimates that 96.8 million American adults (51%) have high cholesterol levels. Often, this condition is successfully controlled by cholesterol-lowering medication.
- As many as 50 million Americans have hypertension, according to the American Heart Association. Many take blood pressure medication that completely controls their condition.

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[3] The EEOC's Interpretive Guidance on Title I of the Americans with Disabilities Act, an appendix to the EEOC's regulations, opines that "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines, or assistive or prosthetic devices." 29 C.F.R. Pt. 1630 App. 1630.2 (j). The regulations themselves are silent on the issue.

[4] Congress viewed persons with disabilities as a "minority of the population." 42 U.S.C. § 12101 (a) (7).

- Nearly 15 million Americans have asthma, according to the National Center for Health Statistics. A large number of asthma sufferers function normally with the use of an inhaler to alleviate their condition.

- According to the American Psychiatric Association, in any six-month period 9.4 million Americans suffer from depression. One in four women and one in ten men can expect to develop it during their lifetime. As many as one in five Americans will suffer at least one episode of *major* depression during their lifetimes. Of those who suffer from depression, 80-90% can be effectively treated. Many persons who take antidepressants can and do remain fully functional.

- 28 million Americans have some degree of hearing loss -- but just over 2 million are profoundly deaf. (58 Fed. Reg. 64356 (1993)). Many millions of these individuals are fully functional, sometimes with hearing aids.

- The American Heart Association reports that approximately 8.7 million Americans have diabetes, with 625,000 new cases diagnosed each year. Most diabetics live relatively normal lives through the use of insulin and/or dietary measures.

- 37 million Americans have some form of arthritis (58 Fed. Reg. 5524, 5526-27 (1993)). Many take over-the-counter pain relievers and function fully.

- Many persons with seizure disorders take medication that fully controls their condition (i.e., they have not had a seizure in 10 years).

- Millions of persons with psychological needs are rendered fully functional by professional counseling.

- Persons with heart arrhythmia take anticoagulants to minimize the risk of a heart attack, and live and work as part of mainstream America.

These are but a few examples of persons with *potentially* debilitating conditions who, thanks to modern medicine, pursue normal lives and work in every kind of job imaginable. By and large, society does not view such persons as these, fully functional in all or virtually all respects, as having "disabilities." To do otherwise in order to stretch a statutory definition, as Petitioners and the EEOC urge, trivializes the ADA and its purposes. Worse, such a broad-brush approach distracts attention from the ADA's intended beneficiaries, those who truly have disabilities but who can still work and make significant contributions to society. A statute that protects everyone protects no one. Moreover, such indiscriminate labeling tends to heap suspicion and ridicule on the very persons whom the statute seeks to protect. This result runs directly counter to Congress's stated intent to protect individuals with disabilities from unequal treatment "based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society." 42 U.S.C. §121101(a)(7).

In sum, with the ADA, Congress intended to protect a limited class of persons: specifically, those who suffer from substantial limitations significantly more severe than those encountered by the average person in everyday life, *not* those who suffer from relatively minor, widely shared non-limiting conditions. *Forrisi v. Bowen*, 794 F.2d 931, 934 (4th Cir. 1986) (to hold otherwise would "debase" the "high purpose" of a statute that seeks to protect "those truly handicapped"); *Buko v. American Medical Laboratories, Inc*, 830 F. Supp. 899, 904 (E.D. Va. 1992), *aff'd* 28 F.3d 1208 (4th Cir. 1994). In order to serve these legislative purposes, and to discourage rather than to feed negative stereotypes that the statute decries, employers and courts should consider individuals in

their actual state, with their *actual* substantial limitations, if any, and not in a hypothetical condition.

B. Considering the Individual's Actual Substantial Limitations is Most Consistent with the ADA's Definition of "Disability."

The ADA defines an actual disability as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2) (A). It does not say an individual has a disability if he or she has an impairment that *might* or *could* substantially limit a major life activity.[5] Thus, a plain, common-sense reading of the statute requires a determination of whether an individual is currently or actually "substantially limited." If he or she is not substantially limited because of some reasonable mitigating measure, then that person should not be considered to have a "disability." Any other reading of the statute would not only corrupt its plain meaning, but would place an impossible burden on the lay business persons responsible for adhering to it.

The definition stresses actual function rather than theoretical condition, and individual assessment rather than blanket categorization. As this Court held last term in *Bragdon v. Abbott*, 524 U.S. 624, 118 S. Ct. 2196, 141 L.Ed 2d 540 (1998), a physical impairment, including poor vision, must first be "substantially limiting" to the individual in order to rise to the level of "disability." 141 L.E.2d at 557 and 141 L.Ed.2d at 574 (O'Connor, concurring in the judgment in part and dissenting in part). Although a nearsighted person whose vision is corrected to 20/20 by corrective lenses, or a person with asthma who uses an inhaler, may have a "physical

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[5] Ignoring the beneficial effects of medical treatments, as Petitioners and the EEOC urge, reduces the statutorily-mandated disability equation to speculation and stereotypes about an impairment. If Congress wished to link protection to impairments alone, it would have -- but Congress instead added the individualized inquiry on "substantial limitations" to the disability definition.

impairment," neither impairment is, in reality, "substantially limiting" with respect to major life activities, thanks to simple medical devices. For all practical purposes, millions of persons benefitting from salutary effects of modern medicine are no different from the mythical "average person" -- against whom "substantial limitations" are measured. See 29 U.S.C. § 1630.2 (j) (1) (i) and (ii). Indeed, at 55% of the population (or 63% of adults), the "average person" uses corrective lenses.

Yet, Petitioners and the EEOC advocate imagining these persons in a theoretical condition, without their eyeglasses or inhalers. The EEOC's vacillating position in this very case illustrates the impossibility of maintaining one's balance on this logical tightrope. In its Certiorari Brief in *Sutton*, the EEOC correctly conceded that both the *Sutton v. United Air Lines* and the *Murphy v. United Parcel Service* cases present the identical question on "whether the existence of an *actual* disability under the ADA is to be assessed with or without taking into consideration mitigating or ameliorative measures employed by the individual involved." U.S. Brief as Amicus Curiae on the Petitions for Writs of Certiorari at 8 (emphasis added); *see also id.* at 13. The EEOC then argued that *Murphy* was the better vehicle to address the issue, or that the situation raised in *Sutton* should be avoided, because the example of correctable vision in *Sutton* may pose a "special" exception. *Id.* at 8, 13-14, fn. 3. The EEOC offered no reasoned explanation why mitigating measures should be considered only in the case of correctable vision impairments. Indeed, given the wide variety of accessible medical treatments for a wide variety of impairments, the same reasons that support creation of a "special exception" for corrective lenses also call for consideration of mitigating measures in many other cases. Apparently recognizing that this argument exposed the fatal flaws in its entire position, the EEOC then reversed field in its *amicus* briefs and argued against treating corrective lenses as an exception. The EEOC's own shifting positions beg the question of whether other measures which not only alleviate certain symptoms of

an impairment, but which virtually eliminate any "substantial limitations" emanating from the impairment, can be ignored in applying a statute dedicated to mainstreaming, and not segregating, persons with "disabilities." Such measures should not be ignored. They affect the way people actually function, as well as the way people are perceived as functioning.

This leads to yet another dissonance between the EEOC's position and the ADA's language. As the third prong of the ADA's definition of "disability" stresses, the *perception* of disability where none actually exists creates a new protected class that, but for the active imaginations of others, never had to exist. *See* 42 U.S.C. § 12102 (2) (C) ("disability" means "being regarded as having such an impairment [that substantially limits one or more of the major life activities of such individual]").[6] Under the ADA, then, the employer should focus not on the least that individuals theoretically could do, but rather, on the most they actually *can* do. Yet, the EEOC's approach to mitigating measures would *require* the employer, through an imaginative leap, to perceive as "disabled" a person who functions normally. Thus, even aside from the practical difficulty or impossibility of asking employers to imagine functional persons in a hypothetical, less-functional state, such an exercise runs directly counter to Congress' purposes. Indeed, elsewhere the

[6] As the EEOC's own interpretive guidance explains, "[a]n individual satisfies the first part of this definition if the individual has an impairment that is not substantially limiting, but the covered entity perceives the impairment as being substantially limiting. For example, suppose an employee has *controlled* high blood pressure that is not substantially limiting. If an employer reassigns the individual to less strenuous work because of unsubstantiated fears that the individual will suffer a heart attack if he or she continues to perform strenuous work, the employer would be regarding the individual as disabled." 29 C.F.R. Pt. 1630, App. § 1630.2 (l) (emphasis added). Also implicit in this guidance is the EEOC's observation that controlled conditions may not be "disabilities."

ADA and the EEOC encourage employers to view employees in their maximum and actual, present functioning capacity.[7]

In other contexts, including a case involving an employer unaware of an employee's medical condition, courts have correctly surmised that "[t]he ADA does not require clairvoyance." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 934 (7th Cir. 1995). Similar "clairvoyance" should not be required to picture functional persons as "substantially limited."

II. LEGISLATIVE HISTORY, OTHER EEOC INTERPRETATIONS, AND THE RECORD OF THE ADA IN PRACTICE SUPPORT RESPONDENTS' POSITION.

As explained above, the ADA's plain language only mandates protection of those who are "substantially limited," and not persons who "would be" or who are, hypothetically, "substantially limited." Similarly, the ADA's legislative history does not mandate protection of individuals who can function normally with mitigating measures. Indeed, the legislative history itself is inconsistent. At times, it indicates that disability should be determined without regard to mitigating measures. At other times, though, the legislative history indicates that the focus should be on an impairment's *effects* on the individual with the impairment, not on the impairment's qualities, and seems to indicate that it would be appropriate to consider mitigating measures.[8] Thus the

[7] The EEOC discourages other forms of speculation. As the EEOC's interpretive guidance on qualified persons with disabilities explains, "[t]his determination should be based on the capabilities of the individual with a disability at the time of the employment decision, and *should not be based on speculation* that the employee may become unable in the future or may cause increased health insurance premiums or workers compensation costs." 29 C.F.R. Pt. 1630, App. § 1630.2 (m) (emphasis added).

[8] Parts of the ADA's legislative history suggest that Congress intended disability to be determined without regard to mitigating measures. H.R. Rep. No. 101-485 pt. 2, at 52 (1990), reprinted in 1990 U.S.C.C.A.N. 303, 334. Yet, a Senate report indicated that in determining

legislative history taken as a whole does not preclude consideration of mitigating measures in determining "disability."

The EEOC is equally inconsistent. While the agency argues that mitigating measures should not be taken into consideration when determining whether an individual has a disability, it is perfectly willing to consider mitigating measures in other circumstances under the ADA. For example, in addressing "reasonable accommodations," the EEOC correctly explains that it is the individual's known functional limitations -- and not the underlying "impairment" -- that must be accommodated. 29 C.F.R. § 1630.9 (a). *See also* "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Questions 5, 38.

The glaring contradictions of the EEOC's positions on mitigating measures are most evident its approach to negative side effects of medication. In its Enforcement Guidance on the Americans with Disabilities Act and Psychiatric Disabilities, the EEOC unequivocally states, "If medications cause negative side effects, these side effects *should be considered* in assessing whether the individual is substantially limited." (emphasis added). *Accord, Christian v. St. Anthony Medical Center*, 117 F.3d 1051, 1052 (7th Cir. 1997), *cert. denied*, 118 S. Ct. 1304 (1998). The EEOC reiterates this position in its March 1999 Policy Guidance on Reasonable Accommodation Under ADA, explaining that "[t]he side

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whether a disability exists, the focus should be on an impairment's effects on the individual with the impairment, not on the impairment's qualities. S. Rep. No. 101-116 at 22-23 (1989). The same report noted that an individual who wears a hearing aid could be "regarded as" disabled even if the hearing aid compensated for the impaired hearing. Id. at 24. If such an individual were covered under the "substantially limited" language of the definition of disability without regard to the mitigating measure (hearing aid), there would have been no need to look to the "regarded as" portion of the definition. 29 C.F.R. § 1630.2 (g). That is, others' perceptions concerning the hearing aid would be irrelevant unless the individual's hearing were not covered by the "substantially limited" language.

effects caused by the medication that an employee must take because of the disability are limitations resulting from the disability." "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Question 38. By way of example, the Guidance on Psychiatric Disabilities states that if an employee with major depression is often late for work because of medication side effects that make him extremely groggy in the morning, the employer, absent undue hardship, must consider offering a reasonable accommodation such as allowing him to come into work one hour later each day. On the other hand, that same Guidance also unequivocally states that the "corrective effects of medications" should *not* be considered in deciding if an impairment is so severe that it substantially limits a major life activity. It defies logic for the EEOC and ADA claimants to have it both ways. SHRM's approach would eliminate these inconsistencies.

In another nod to practical functionality, the EEOC and the courts have agreed that short-term conditions are not considered "substantially limiting," and thus are not ordinarily classified as handicaps or disabilities covered under the Rehabilitation Act or the ADA. 29 C.F.R. Pt. 1630, App. 1630.2(j); *Halperin v. Abacus Technology Corp.*, 128 F.3d 191 (4th Cir. 1997); *McDonald v. Pennsylvania*, 62 F.3d 92, 96 (3rd Cir. 1995). Again, the emphasis is on common-sense notions of what constitutes a disability, and the idea that temporary conditions do not qualify. Most people who take medication or wear corrective devices do so on a habitual basis, and any departure from routine is typically brief -- analogous to a temporary condition.[9]

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[9] Rehabilitation Act cases decided prior to the ADA support Respondents' position that ameliorative measures belong in the disability equation. *See Reynolds v. Brock*, 815 F.2d 571, 574 (9th Cir. 1987) (evaluated plaintiff in actual, medicated state, not a hypothetical, unmedicated state); *Trembczynski v. City of Calumet City*, 1987 WL 16604 (N.D. Ill. 1987) (officers do not have "handicaps" if vision is correctable to 20/20). Cases decided under the Rehabilitation Act since ADA offer little if any additional guidance. As under the ADA, courts

Accordingly, taking the ADA's legislative history and pre-ADA cases as a whole, nothing definitively endorses Petitioner's approach or precludes that of Respondent. On the other hand, the checkered history of the ADA in practice strongly commends Respondents' proposed rule. The chaos that preceded the statute has only grown since its enactment. It has spawned a legion of litigation, and has sown discord and confusion among employees as well as employers.[10] A clear and simple rule, such as the one Respondent proposes, will establish a consistent principle that lay persons can understand and follow. It is a rule that employers can live with and employees can work with. Most important of all, it is a rule whose implementation will serve the original purpose of the ADA: to assure that employers, and society as a whole, will view all individuals at their best and not their worst, and as they actually function.

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split on whether to consider mitigating measures in determining handicap are split. See, e.g., *Mackie v. Runyon*, 804 F.Supp. 1508, 1510-11 (M.D. Fla. 1992) (bipolar disorder stabilized by medication is not substantially limiting); *Chandler v. City of Dallas*, 2 F.3d 1385, 1390-91 (5th Cir. 1993)(an insulin-dependent diabetic did not have a disability), *reh'g, en banc, denied*, 9 F.3d 105 (5th Cir. 1993), *cert. denied*, 511 U.S. 1011 (1994). Cf. *Tiff v. Secretary of Transp.*, 1994 WL 579912, at *3-*4 (D.D.C.1994)(depression controlled by medication was a disability); *Gilbert v. Frank*, 949 F.2d 637, 641 (2nd Cir. 1991)(an individual who could not function without kidney dialysis had a substantially limiting impairment). Thus, although this Court stated in *Bragdon* that the ADA provides no less protection than the Rehabilitation Act, 141 L.Ed.2 at 553, the issue was never conclusively decided under the Rehabilitation Act.

[10] The EEOC argues that adopting SHRM's position "would inject uncertainty and instability into the system. See 97-1943 U.S. Brief at 8; 97-1992 U.S. Brief at 16-17. Yet, actual experience has shown that the EEOC's approach to this issue has itself created that unhappy result. A consistent rule based on actual observation and function, rather than on prediction and speculation, will far more likely contribute to a stable system.

III. CONSIDERING MITIGATING MEASURES WILL STILL PROTECT PERSONS WITH DISABILITIES

Contrary to Petitioners' and the EEOC's contentions, SHRM's approach would not set such a restrictive definition of "disability" as to gut the ADA and leave virtually no individuals subject to its protections. Rather, SHRM's rule prevents ADA compliance from becoming a free-for-all haven for every individual with some minor, correctable physical or mental condition and focuses the ADA's protections on the individuals Congress intended to protect. The effect of each individual's condition, as well as the effect (both good and bad) of any medical treatment or device, should all be taken into account as they affect the ability to function.

The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual." 42 U.S.C. § 12102 (2) (A). "Substantially limits," as defined by the EEOC, means:

> Unable to perform a major life activity that the average person in the general population can perform; or
>
> Significantly restricted as to the condition, manner or duration under which an individual can perform a particular major life activity as compared to the condition, manner, or duration under which the average person in the general population can perform the same major life activity.

29 C.F.R. § 1620.2(j)(1)(i and ii). More significantly, as the Court observed in *Bragdon*, "the Act addresses substantial limitations on major life activities, not utter inabilities." 141 L.Ed.2d at 559. "When significant limitations result from the impairment, the definition is met even if the difficulties are not insurmountable." *Id.* Under SHRM's proposed interpretation, an employer or court confronted with an individual claiming to have a disability and to be subject to the ADA's protections would first determine if the

employee's abilities during the relevant time period demonstrate a substantial limitation of a major life activity as compared to the "average" person.[11] It is the individual's present ability, as affected by the impairment and any side effects of medication or treatment, that would be the focus of the examination. Courts and employers would not be expected to speculate about what the individual's limitations could be if untreated (or create hypothetical limitations where none currently exist).

Borrowing the EEOC's generalized example used on page 14 of its Amicus Brief in *Murphy v. United Parcel Service, Inc.*, an employee who requires a modification of his work to accommodate an uncontrollable condition would be entitled to the modification (provided it is reasonable, effective and did not cause an undue hardship to the employer). If another employee's condition is somewhat controlled (but still substantially limiting), the employee would also be entitled to reasonable accommodation from the employer. Nevertheless, an employee whose medication eliminates an impairment would not be entitled to an accommodation as none would be needed.[12]

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[11] The EEOC's interpretation creates additional conflicts and questions. For example, when determining what the "average" person can do, are the "average" person's abilities examined with or without mitigating measures? If the "average" person's abilities are examined with mitigating measures, then it is possible that every individual (or a majority of individuals) could be classified as having "disabilities"since they would be substantially limited in some major life activity (without mitigation) that the "average" person could perform (with mitigation). If the "average" person's abilities are examined without mitigating measures, then courts and employers will be forced to speculate twice -- first, with regard to the individual's limitations in the absence of mitigation and, again, with respect to the "average" person's abilities in the absence of mitigation.

[12] The EEOC complains in its example that employers would be free to discharge employees who sought permission to take medication or treatment that eliminates their condition. Such unfounded concerns ignore several key principles. First, the EEOC attempts to paint an improbable

SHRM's proposed standard when applied to real life examples proves that the EEOC's proposed interpretation is unneeded, and that individuals whose condition and/or treatment substantially limits a major life activity will be protected by the ADA. In the case of human immunodeficiency virus ("HIV"), this Court determined that an individual's HIV infection rises to the level of a disability. This Court noted the "predictable and, *as of today*, an unalterable course" of the disease on an individual's immune system. *Bragdon*, 141 L.Ed.2d at 554 (emphasis added). With or without protease inhibitors, part of the combination therapies that help keep many persons with HIV healthy for longer, the retrovirus' genetic material becomes integrated with the chromosomes of the body's cells. *Id.* The latent viral reservoir of HIV slowly attacks the immune system even though anti-retroviral therapies can prolong persons' disease-free states. These particular "mitigating measures" therefore do not eliminate the "substantial limitations" on the major life activities that the Court discussed and appeared willing, but unable, to discuss in *Bragdon*. Moreover, this vigorous medical regimen exacts other real costs and limitations on the individuals undergoing combination therapies. The regimen itself requires strict adherence to diet and medication schedules. Acute side-effects associated with the treatment

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picture of some Orwellian employer who fires employees for taking prescribed medication. The EEOC is attempting to push the protections of the ADA into areas Congress never intended it to cover. Everyone would equally be offended if an employer fired an employee for taking aspirin because the employee had a headache. Yet, an employee with a one time headache who is taking aspirin would not have a "disability" under any standard adopted by the Court. Second, an employee's restricted regimen of treatment (that, for example, required a certain diet and timing for the taking of medication) may substantially limit a major life activity and still allow the employee to be protected by the statute. Finally, Congress and individual states have already adopted legislation protecting the employee's ability to seek and receive medical treatment (such as the Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601, *et. seq.*, the Occupational Safety and Health Act, 29 U.S.C. §§ 561, *et. seq.* and state leave and workers compensation laws).

may include nausea, diarrhea, and neuropathy (numbness in the extremities). In the everyday context of the workplace, it is more often these disruptive regimens and the individual side-effects that human resource professionals must accommodate than the underlying viral infection itself.[13] There is every reason to believe that, in viewing the HIV-positive employee in the actual condition that must be accommodated under ADA, the person is still "substantially limited" even with the mitigating treatments and is therefore protected under the ADA.

This example, as in the case of persons with prosthetic legs or using a wheelchair, shows that under SHRM's proposed rule, the persons intended to be protected under ADA may still be "substantially limited," protected, and entitled to reasonable accommodations even when helpful medical treatments and devices -- which affect the actual condition and functional limitations of the individual -- are taken into account.

CONCLUSION

The Court should resolve the inconsistencies in the courts below and the internal contradictions in the Petitioners' and EEOC's position by articulating a clear, simple rule: For purposes of determining "disability" status under the ADA, individuals should be assessed in light of their actual ability to function and any actual "substantial limitation" to their major life activities. The assessment should take into account both the beneficial and detrimental effects, if any, of measures, devices and treatments used to ameliorate or eliminate the condition in question. This principled, common-sense

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[13] The EEOC's new guidelines on reasonable accommodations even explain that it is these limitations from treatments that must be accommodated. "EEOC Policy Guidance on Reasonable Accommodation Under ADA," March 1999, Question 22, example A (citing limitations and side effects from HIV treatment regimen to be accommodated).

approach will facilitate employers' ADA compliance, while also protecting those whom Congress intended to protect.

Respectfully submitted,

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